STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and the Circuit Court for the County of Macomb)

JENNIFER L. HUDOCK and
BRIAN D. HUDOCK,

Plaintiffs-Appellees,

-vs-

EDWARD SCHULAK, HOBBS &
BLACK, INC., Architects and Consultants,

Defendant-Appellant.
_____/

Supreme Court No: 126859
C.A. No: 245934
L.C. No: 00-1912 CE

SULLIVAN, WARD, ASHER & PATTON, P.C.

BRIEF ON APPEAL ON BEHALF OF DEFENDANT-APPELLANT EDWARD SHULACK, HOBBS & BLACK

PROOF OF SERVICE

**** ORAL ARGUMENT REQUESTED ****

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STATEMENT OF JURISDICTION

The Michigan Supreme Court assumed jurisdiction over this matter by granting Appellant's Application for Leave to Appeal on May 12, 2005. MCR 7.301(A)(2).

STATEMENT OF ISSUES PRESENTED

I. **DOES THE TWO YEAR STATUTE OF LIMITATIONS FOR MALPRACTICE CLAIMS, MCL 600.5805(6), APPLY INDEPENDENTLY OF THE SIX YEAR STATUTE OF REPOSE TO PROFESSIONAL NEGLIGENCE CLAIMS AGAINST ARCHITECTS AND ENGINEERS?**

Defendant-Appellant says "Yes."

Plaintiff-Appellee says "No."

The trial court said "Yes."

The Michigan Court of Appeals said "No" while creating a split of authority on the issue.

II. **DOES THE TWO YEAR STATUTE OF LIMITATIONS FOR MALPRACTICE CLAIMS APPLY OVER THE THREE YEAR GENERAL NEGLIGENCE – LIMITATIONS PERIOD IN THIS ACTION FOR PROFESSIONAL NEGLIGENCE AGAINST ARCHITECTS?**

Defendant-Appellant says "Yes."

Plaintiff-Appellee says "No."

The trial court said "Yes."

The Court of Appeals did not address this issue.

STATEMENT OF FACTS

Plaintiffs are employees of non-party Campbell Ewald, which leased premises located at 12220 East Thirteen Mile Road, Warren, Michigan, from former Defendant Warren Regency G.P. LLC. Defendant Edward Schulak, Hobbs & Black ("Defendant") was hired by Campbell Ewald to design a renovation of the building spaces at that location. The renovation project began in early 1998, and was completed by April 1998.

Plaintiffs initiated this action on May 10, 2000, against a number of the former Defendants. Plaintiffs then filed a First Amended Complaint on November 14, 2000, naming Defendant and alleging that it was liable for professional malpractice in designing the building renovation at issue. A Second Amended Complaint was thereafter filed, containing similar allegations of professional malpractice (Apx. 3a).

In the Second Amended Complaint, it is alleged that on or about April 24, 1998, during the course of their employment with Campbell Ewald, Plaintiffs were exposed to hazardous environmental conditions in the premises due in part to poor ventilation, plumbing and renovations (Apx. 17a, ¶ 59). Plaintiffs eventually ceased working in the building on approximately August 24, 1998.

On September 6, 2001, Defendant filed a Motion for Summary Disposition, arguing in pertinent part that this action was barred by the statute of limitations (Apx. 31a). [The Motion contained a second argument that the action was barred because Plaintiffs could not prove within a reasonable certainty the exact cause of their damages; the trial court rejected that

argument as being prematurely raised before the conclusion of discovery and the issue is not material to this Appeal.][1]

Following the filing of additional briefs regarding the statute of limitations issue, the trial court granted Defendant's Motion for Summary Disposition in a written Opinion and Order entered March 4, 2002 (Apx. 656a). Over Plaintiff's objections, the trial court applied the two year professional malpractice statute of limitations set forth in current MCL 600.5805(6), infra. and dismissed the action. (Id).

Following the dismissal of the other party Defendants, Plaintiffs filed their Claim of Appeal in the Michigan Court of Appeals against this Defendant to contest the application of the two year statute of limitations.

The Michigan Court of Appeals issued its published, authored decision on July 8, 2004, vacating the summary disposition order and holding that the claim was timely filed within the six year statute of repose applicable to claims against architects and engineers, MCL 600.5839; the Court of Appeals concluded that § 5839 also served as a statute of limitations and superseded [e.g., precluded application of) the two year period commencing upon accrual of professional malpractice actions, MCL 600.5805(6). (Apx. 672a). The Court of Appeals acknowledged that its decision was contrary to Witherspoon v Guilford, 203 Mich App 240; 511 NW2d 720 (1994), but declined to follow Witherspoon on the basis that it "was wrongly decided" (id, p. 8).

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[1] In responding to the Motion, Plaintiffs argued in part that Defendant waived the statute of limitations defense because it had not been pled as an affirmative defense in Defendant's original pleadings. Defendant thus filed a Motion for Leave to Amend its Affirmative Defenses, which was granted on November 13, 2001, due to Plaintiffs' failure to demonstrate prejudice arising from the amendment (Apx. 641a). Defendant had previously filed its Amended Answer and Affirmative Defenses on November 5, 2001 (see: Third Amended Answer and Affirmative Defenses, 11-5-01). The Michigan Court of Appeals affirmed this order in its written opinion (Apx. 672a).

Defendant filed its Application for Leave to Appeal with the Michigan Supreme Court from the July 8, 2004 Opinion of the Michigan Court of Appeals. On May 12, 2005, the Michigan Supreme Court granted leave to appeal and directed the parties to address the following nonexclusive issues within their briefs:

> (1) whether MCL 600.5839(1) precludes application of the statutes of limitation prescribed by MCL 600.5805 and, if not, (2) which statute of limitation, MCL 600.5805(6) or MCL 600.5805(10), is applicable to the claim asserted against defendant Edward Schulak, Hobbs & Black, Inc. in this case.
>
> Apx. 682a.

ARGUMENT I

THE TRIAL COURT CORRECTLY GRANTED SUMMARY DISPOSITION IN FAVOR OF DEFENDANT DUE TO THE EXPIRATION OF THE TWO-YEAR STATUTE OF LIMITATIONS GOVERNING PROFESSIONAL MALPRACTICE ACTIONS, WHICH IS NOT SUPERCEDED BY THE SIX YEAR STATUTE OF REPOSE APPLICABLE TO CERTAIN CLAIMS AGAINST ARCHITECTS.

A. Standard of Review

This case involves questions of statutory interpretation, which are reviewed *de novo*. Roberts v Mecosta, 466 Mich 57, 62; 642 NW2d 663 (2002). The Michigan Supreme Court also reviews the trial court's grant of summary disposition *de novo*. Id.

B. Introduction to Controlling Statutes

By way of introduction, it is well established that a court, in ruling on a statute of limitations defense, is to look beyond the technical label that a plaintiff attaches to a cause of action to the substance of the claim asserted. Local 1064 v Ernst & Young, 449 Mich 322, 327, fn 10; 535 NW2d 187 (1995). In determining whether an action is of a type subject to a particular statute of limitations, the court is to look at the basis of the plaintiff's allegations. Aldred v O'Hara-Bruce, 184 Mich App 488, 490; 458 NW2d 671 (1990). The type of interest harmed, rather than the label given the claim, is the focal point in determining which limitation period controls. Brownell v Garber, 199 Mich App 519, 526; 503 NW2d 81 (1993). Consistently, a plaintiff may not avoid application of the two-year malpractice period of limitation merely by couching malpractice claims in terms of ordinary negligence. Simmons v Apex Drug Stores, 201 Mich App 250, 254; 506 NW2d 562 (1993).

With these standards in mind, MCL 600.5805(6) (formerly MCL 600.5805(4)) sets forth a two-year statute of limitations for professional malpractice actions which applies to

actions against architects.[2] See also, City of Midland v Helger Const Co, 157 Mich App 736, 740-741; 403 NW2d 218 (1987). However, MCL 600.5805(14) (formerly § 5805(10)), also directs attention to MCL 600.5839:

> The period of limitations for an action against a state-licensed architect, professional engineer ... based on an improvement to real property shall be as provided in section 5839.
>
> Former MCL 600.5805(14).

MCL 600.5839 provides in pertinent part:

> No person may maintain any action to recover damages for ... bodily injury or wrongful death, arising out of the defective or unsafe condition of an improvement to real property ... against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor .... However, no such action may be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.
>
> MCL 600.5839(1).

As originally enacted, § 5839 protected architects and engineers and limited the actionable period to six years after the time of occupancy, use, or acceptance of the improvement. The purpose of § 5839(1) was to relieve those professionals of open-ended liability to the general public for alleged defects in their workmanship following the abolishment of privity of contract as a precondition to the maintenance of such a suit. O'Brien v Hazelet & Erdal, 410 Mich 1, 14; 299 NW2d 336 (1980).

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[2] Amendments to § 5805, effective March 31, 2003 added two subsections and redesignated several other subsections including former subsections (4) and (10). The Court of Appeals' opinion in this action cited to the former, as opposed to the current designations. This Brief will cite to the current designations of the subsections.

§ 5839(1) was amended in 1985 to extend application of the six year period of repose to actions against contractors and to subject the six-year repose to a one-year discovery provision in gross negligence claims (with a final limitation of ten years). Witherspoon v Guilford, 203 Mich App 240, 245-246; 511 NW2d 720 (1994). This amendment was prompted by a series of decisions that had previously allowed actions to proceed against contractors even though over several years beyond the repose period had elapsed since the completion of the project. See, e.g., Carmell v Slavik, 68 Mich App 202; 242 NW2d 66 (1976) (sixteen year period had elapsed); Filcek v Utica Bldg Co, 131 Mich App 396; 345 NW2d 707 (1984) [thirteen years].

Subsequent to the 1985 amendment, a new issue regarding the application of MCL 600.5839 arose. Specifically, in a series of cases, the Michigan Court of Appeals held that the six year statute of repose only applied to limit engineers; architects; and contractors' exposure to litigation by third persons (e.g., those not in privity of contract) and that the repose was not applicable to a suit brought by the owner of the project for deficiencies in the improvement itself. See, e.g., City of Marysville v Pate, Hirn & Bogue, Inc, 154 Mich App 655; 397 NW2d 859 (1986), Midland v Helgar, supra, Burrows v Bridigare, 158 Mich App 175; 404 NW2d 650 (1987). In such latter instances, the statute of limitations under MCL 600.5805 was not subject to the six year period of repose.

In response to these decisions, the Michigan legislature enacted 1988 PA 115, effective May 1, 1988, by adding then subsection (10) to MCL 600.5805 [currently MCL 600.5805(14)]. As currently stated in MCL 600.5805(14):

> The period of limitations for an action against a state licensed architect, professional engineer, land surveyor or contractor based on an improvement to real property shall be as provided in section 5839.

The parameters of current MCL 600.5805(14) were tested in Michigan Millers v West Detroit Building Co, 196 Mich App 367; 494 NW2d 1 (1992). There, the Michigan Court of Appeals held that the language of current § 5805(14) was "not clear and unambiguous, because reasonable minds could differ concerning whether § 5805(10) clearly specifies the applicable limitation." 196 Mich App at 374. However, after reviewing the legislative history, the Michigan Millers Court held:

> That the legislature may have inartfully expressed its intent and could have chosen more suitable alternatives to accomplish its purpose does not alter the fact that the legislature sought to set aside this Court's holdings in *Marysville, Midland, and Burroughs* [in enacting then § 5805(10)].
>
> 196 Mich App at 377.

As was more recently explained in Witherspoon, through the addition of current § 5805(14), § 5839 now "applies to all claims against architects, engineers, or contractors for injuries arising from improvements to real property, whether involving the original or third parties, and whether based on tort or contract." 203 Mich App at 245.

In Witherspoon, supra, the Michigan Court of Appeals addressed for the first time the issue controlling over the instant action: Whether the existence of the six-year period of repose set forth in § 5839 precludes application of the shorter limitation periods of § 5805, where the cause of action accrues within six years after use or acceptance of the improvement and the limitations period would have expired before the end of the six year period. The Witherspoon Court held that the six-year period of repose does not operate to extend the shorter limitations periods of § 5805. 203 Mich App at 246-247. The Court reasoned as follows:

> We understand section 5839, together with section 5805(10), to set forth an emphatic legislative intent to protect architects,

> engineers, and contractors from stale claims. However, because we must interpret the statute as a whole, reading each section in harmony with the rest of the statute, *Michigan Millers, supra*, we do not understand those provisions to expand the general three-year period of viability for injury claims under § 5805(8) to a six-year period insofar as the claims apply to those protected by § 5839. While it is possible, as plaintiff argues, that the Legislature intended to expand the period of liability as a "trade-off" for the protection afforded by the provision, we find no hint of such an intent in the provision itself or elsewhere. Moreover, our adoption of this interpretation would necessarily render § 5805(8) nugatory in such cases, an effect that this Court must avoid in constructing statutes. *Id.* Because the Legislature in enacting these provisions did not clearly indicate that it intended through section 5839 to breathe additional life into claims that would otherwise have expired under section 5805(8), we choose not to read that intention into the statute.
>
> Id., at 247.

The Witherspoon Court recognized a distinction between the periods of "limitations" set forth in § 5805 and the period of "repose" set forth by § 5839. Witherspoon identified, by statutory definition, the statute of limitations period as running from the date of accrual of the claim while the statute of repose set forth in § 5839 was a period which ran from six years from the date of the first use, occupancy or acceptance of the improvement at issue. Id, at 246. Witherspoon observed that "were an injury to arise from an alleged defect in an improvement more than six years after use or more than one year after discovery, § 5805(8) would not create for the would be plaintiff an extended or additional period of viability notwithstanding § 5839." Id.

The analysis of Witherspoon served as controlling authority in this jurisdiction under MCR 7.215 until the publication of the Court of Appeals' opinion in this action, Ostroth v Warren Regency, G.P. LLC, 263 Mich App 1; 687 NW2d 309 (2004). The Court of Appeals in this action specifically held that Witherspoon was erroneously decided:

> We believe that *Witherspoon* was wrongly decided. Citing *O'Brien*, the *Witherspoon* Court stated that "[t]he effect of [§ 5839] was one of both limitation and repose[.]" *Witherspoon*, supra at 245. Yet, in its effort to abide by the general rules of statutory construction, the Court concluded that application of § 5805(8) could not be precluded where the claim was one of negligence against an architect, engineer, or contractor and was brought within six years after use, acceptance, or occupancy of an improvement because to hold otherwise "would necessarily render § 5805(8) nugatory." *Id.* At 247. But such a result is not impermissible in this case because, as *Witherspoon* and *Michigan Millers* noted, a specific statute of limitations controls over a general statute of limitations. *Witherspoon*, *supra* at 246; *Michigan Millers*, *supra* at 374. The rules of statutory construction merely serve as guides to assist in determining intent with a greater degree of certainty. *Morris & Doherty, P.C. v Lockwood*, 259 Mich App 38, 43-44; 672 NW2d 884 (2003). They should not be applied blindly. *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994).
>
> Id, at 8; Apx. 679a.

Whether the trial court correctly granted Defendant's Motion for Summary Disposition in this action depends upon whether the Supreme Court follows Witherspoon or Ostroth. If it follows Witherspoon, the two year statute of limitations would bar this action as a matter of law.

Specifically, MCL 600.5838(1) states that a professional malpractice action accrues on the date of the last service performed by the state licensed professional. Moreover, it is well settled that an architect is deemed to have rendered his last professional services regarding the design, specifications and construction of a building when the building is used, accepted, or occupied. Male v Mayotte, Krose, 163 Mich App 165, 169; 413 NW2d 698 (1987); City of Midland, supra.

Here, the plaintiffs' own pleadings substantiate that the building was used and occupied in April of 1998 – the time upon which defendant is deemed to have rendered its last

professional service regarding the building as a matter of law. (See, e.g., Second Amended Complaint, ¶ 2, Apx. 3a). Yet, Plaintiffs did not file their First Amended Complaint adding Defendant as a party to this action until November 14, 2000, well after the expiration of the two-year limitations period. Given Witherspoon's precedential value, the trial court correctly found that Plaintiffs' claim was barred by the two year limitations period. Moreover, MCR 7.215(J), infra, compelled the Court of Appeals to apply Witherspoon and affirm the summary disposition order. (See: Subargument (E) herein). The Court of Appeals committed reversible error by refusing to do so.

C. MCL 600.5805(14) Does Not Independently Compel Application of MCL 600.5839 to the Exclusion of the Other Paragraphs of § 5805.

MCL 600.5805(14) states:

> The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in § 5839.
>
> MCL 500.5805(14).

The Court of Appeals below held that this subsection reinforced "the O'Brien Court's opinion that MCL 600.5839 is not only a statute of repose, but also a statute of limitations." (EXHIBIT A, p 6). Still, such does not compel a finding that § 5805(14) mandates application of § 5839 to the exclusion of the general statutes of limitations set forth in § 5805 when the action accrues prior to the six year period set forth in § 5839.

As indicated, the Court of Appeals in Michigan Millers acknowledged that the language of § 5805(14) was ambiguous with respect to whether it was to render § 5805 inapplicable to professional negligence actions against architects, engineers and contractors. 196 Mich App at 374. Considering therefore the legislative intent in adding current ¶ 14 to MCL 600.5805, the

legislature intended merely to overrule the preexisting Michigan Court of Appeals' cases which had held that § 5839 only applied to third party actions. 196 Mich App at 371, 378. Hence, the specific language of § 5805(14) dictates application of § 5839 to any action against "a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property." MCL 600.5805(14). Moreover, O'Brien and Michigan Millers are completely devoid of any discussion which would support a ruling that when a cause of action accrues prior to the six year period after the time of occupancy, § 5839 would apply to the exclusion of the shorter limitations periods set forth in § 5805.

For these reasons, the Court of Appeals in this action erroneously cited MCL 600.5805(14) as supporting the application of MCL 600.5839 as a statute of limitations to the exclusion of the balance of the statute of limitations set forth in § 5805. If the Legislature intended to render § 5805 obsolete in this manner, it could have plainly done so with more specific statutory language.

The Michigan Court of Appeals' opinion must be vacated in favor of an order reinstating the trial court's grant of summary disposition for this reason as well.

D. Witherspoon is Fully Supported by Controlling Principles of Statutory Construction; Conversely, the Court of Appeals Here Violated Those Same Maxims.

Several principles of statutory construction apply to assist in the proper construction of the applicable statutes.

For example, when statutory construction is necessary, a statute's plain language must be applied as written; however, if the provisions of a statute(s) appear to conflict, they must be read harmoniously if possible. Nowell v Titan Ins Co, 466 Mich 478; 648 NW2d 157 (2002). When two statutes address the same subject, Courts must endeavor to read them harmoniously

and to give both statutes a reasonable affect. House Speaker v State Administrative Board, 441 Mich 547; 495 NW2d 539 (1993). The Legislature is deemed to be aware of judicial interpretations of existing statutes when amending those statutes or enacting new legislation. Nation v W.D.E. Electric Co, 454 Mich 489; 563 NW2d 233 (1997), Gardner v VanBuren Public Schools, 445 Mich 23; 517 NW2d 1 (1994). Statutes should not be construed as rendering specific provisions of others nugatory unless clearly indicated by the Legislature. Michigan Millers, supra. Repeals of a statute may not be implied if there is any other reasonable construction which may be given to a statute. Wayne County Prosecutor v Department of Corrections, 451 Mich 569, 576-577; 548 NW2d 900 (1996), House Speaker, supra.

Witherspoon's harmonization of § 5839 with the applicable statutes of limitations set forth in § 5805 is fully supported by these statutory maxims. Witherspoon specifically recognized that interpreting § 5839 as applying to the exclusion of § 5805 "would necessarily render [then] § 5805(8) nugatory in such cases, an affect that this Court must avoid in construing statutes." 203 Mich App at 247, citing Michigan Millers, supra. Witherspoon also correctly observed that the Legislature did not clearly indicate that it intended to apply § 5839 to the exclusion of the applicable limitations periods set forth in § 5805 -- particularly those applicable to general negligence claims against contractors or professional malpractice claims against architects and engineers.

In addition to ignoring these principles, the Court of Appeals below also ignored that the Legislature enacted a series of amendments to § 5805 after the publication of Witherspoon (as recently as 2003) but made no amendments to overrule Witherspoon. Because the Legislature is presumed to be aware of the existing common law construing § 5805 and §5839,

that common law (e.g., Witherspoon) must be assumed to be representative of the popular will absent clearly articulated legislative changes. House Speaker, supra. The Legislature's failure to act upon Witherspoon while otherwise amending § 5805 speaks to its intent to retain Witherspoon's enforcement of § 5805(6) as the controlling statute of limitations in professional malpractice actions against architects and engineers. Compare, Local 1064 v Ernst & Young, 449 Mich 322, 329, fn 12; 535 NW2d 187 (1995) [statutory amendments to § 5805 which were silent as to meaning of term "malpractice" is "indication of the Legislature's acquiescence in [Supreme] Court's construction of § 5805..."].

E. The Court of Appeals Committed Reversible Error in Holding that Statements of Dicta in *O'Brien* and *Michigan Millers* Allowed it to Issue an Opinion in Conflict With *Witherspoon* Without Following the Procedures Set Forth in MCR 7.215(J).

MCR 7.215, governing the "precedential effect of published decisions," states that "a panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court or by a special panel of the Court of Appeals..." MCR 7.215(J). Statements of dicta, however, do not constitute a "rule of law" within the meaning of this Court Rule and thus are not binding under either MCR 7.215 or similar principles of *stare decisis*. Carr v City of Lansing, 259 Mich App 376, 387-388; 674 NW2d 168 (2003), Colucci v McMillin, 256 Mich App 88, 97, fn 6; 662 NW2d 87 (2003). Dicta is a judicial comment made in the course of delivering a judicial opinion which is unnecessary to the decision in the case and not otherwise germane to the controversy. Carr, supra. Statements of the Supreme Court in dicta have no precedential value. See, e.g., People v Sobczak-Obetts, 253 Mich App 97, 103-104, fn 4; 654 NW2d 337 (2002).

In creating a conflict with Witherspoon, the Court of Appeals' opinion below concluded that it was obliged to instead follow O'Brien v Hazelet & Erdall, supra, and Michigan Millers v West Detroit Building Co, Inc, supra, which, in statements of dicta, stated that § 5839 served as both a statute of limitations and a statute of repose. 410 Mich at 15; 196 Mich App at 378. **Contrary to the Court of Appeals' ruling herein, those statements in O'Brien and Michigan Millers did not constitute the "rule of law" established in those actions and did not otherwise constitute binding precedent which compelled it to create a conflict with Witherspoon.** In any event, even if those same statements were controlling as "the rule of law," they were misapplied by the Court of Appeals in this action. For, O'Brien never analyzed whether § 5805 could operate in tandem with § 5839 in professional malpractice actions. Rather, O'Brien's statements merely served as potential functions of § 5839 in the abstract without consideration of its relationship with §5805.

In O'Brien, the Michigan Supreme Court addressed the Plaintiff's claim that § 5839 violated due process because it could potentially operate to bar a cause of action before all necessary elements constituting the cause of action are present. As its "rule of law," the O'Brien Court held that § 5839 did not violate due process and that the legislature could constitutionally extinguish the right to recover for damages incurred after the six year period set forth in that statute. 410 Mich at 15-16. **Significantly, none of the Plaintiffs in O'Brien were injured by alleged design defects that were discovered within that six year period.** Id. Cf. Fennell v Nesbitte, Inc, 154 Mich App 644, 648-649; 398 NW2d 481 (1986). Nonetheless, the Supreme Court in O'Brien parenthetically stated that § 5839 served as both a statute of limitations and a statute of repose, ignoring that the distinction was completely unnecessary or even germane to the constitutional challenge before it. 410 Mich at 15.

In Fennell, supra, the Michigan Court of Appeals held that the "limitations" and "repose" characterizations in O'Brien were dictum and "[d]eclined the Plaintiffs' invitation to apply the dicta in O'Brien" to the case before it, involving claims that were discovered shortly before expiration of the six year period of § 5839. The Court of Appeals' in Fennell held that it did "not read MCL 600.5839... as a 'discovery' statute of limitations" as characterized by O'Brien. **Fennell instead concluded that "the intent of the Legislature was that [§ 5839] be one of repose – no action can be filed after that period of time has elapsed." 154 Mich App at 649-650.** Fennell also held that the fact that the Legislature amended § 5839 to expressly provide a "discovery" statute of limitations where gross negligence is alleged but failed to similarly amend the six year period for claims for ordinary negligence buttressed its "conclusion that the statute is one of repose" only. 154 Mich App at 650.

The statement in Michigan Millers, supra, that § 5839 served as both a statute of repose and a statute of limitation was similarly not the "rule of law" in that action; that characterization was also dicta and -- in the context asserted in that action -- did not serve as "the rule of law" to allow the Court of Appeals below to create a conflict with Witherspoon.

In Michigan Millers, the plaintiffs argued that § 5839(1) did not govern their claims because they were building owners alleging damages for defects in the improvement of the structure itself, rather than third parties who sustained personal injuries which "arose out of" the defective improvement. Instead, the plaintiffs asserted that the three year statute of limitations in § 5805(8) applied to their claims. In this regard, the plaintiffs there relied upon Burrows v Bidigare, supra; Midland v Helger, supra and Marysville v Pate, supra, which had all held that MCL 600.5839(1) only applied to third party actions (e.g., actions filed by plaintiffs not in direct privity with the defendants).

The Court of Appeals in Michigan Millers held that the addition of § 5805(14), supra, was merely intended to overrule these cases and to require application of § 5839(1) "to all actions brought against contractors [architects and engineers] on the basis of an improvement to real property, including those brought by owners for damage to the improvement itself." 196 Mich App at 378. **This was its rule of law.** The Court in Michigan Millers concluded that the Plaintiffs' claim was time barred because it was brought more than six years after the use of the improvement, as dictated by § 5839(1).

In Michigan Millers, the Court of Appeals cited to O'Brien's characterization of § 5839 as both a statute of limitation and a statute of repose. However, again, that purported distinction was not the "rule of law" in that case and was not necessary to that case's adjudication. That distinction again was dicta, rather than binding precedent upon the Michigan Court of Appeals in this action.

In any event, the original statement in O'Brien that § 5839 may be considered both a statute of limitations and statute of repose was not intended to mean that in actions where the suit was filed after the specified limitation period of § 5805 expired, § 5839 displaced § 5805 and extended the limitations period to six years after the date of occupancy. The O'Brien Court was not presented with and did not address the issue of whether § 5839 displaces the otherwise applicable paragraph of § 5805 in such a situation. O'Brien intended nothing more than to explain that § 5839 could arguably apply as a statute of limitation when the cause of action accrued shortly before the six year period described therein. O'Brien again never intended to address or otherwise analyze the extent to which § 5839 could operate in tandem with § 5805. O'Brien simply was not concerned with that issue.

For these reasons, neither O'Brien nor Michigan Millers compelled the Court of Appeals below to decline to follow Witherspoon. Nor does this precedent contain any persuasive discussions of the subject statutes to warrant an order affirming the Court of Appeals' decision herein. That decision must be vacated and the trial court's summary disposition order must be affirmed.

ARGUMENT II

THE TWO YEAR STATUTE OF LIMITATIONS APPLICABLE TO PROFESSIONAL MALPRACTICE ACTIONS, MCL 600.5805(6), APPLIES TO THE CLAIMS ASSERTED AGAINST THE ARCHITECT DEFENDANT IN THIS ACTION.

A. Standard of Review

This issue is also one which involves statutory interpretation and is also thus subject to *de novo* appellate review. Roberts v Mecosta, supra.

B. Discussion

MCL 600.5805(6) states:

> (6) Except as otherwise provided in this chapter, the period of limitations is two years for an action charging malpractice.
>
> MCL 600.5805(6).

In addition, MCL 600.5805(10) states:

> (10) the period of limitations is three years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.
>
> MCL 600.5805(10).

For the reasons to follow, § 5805(6) applies as an absolute defense to this action.

In defining the extent to which a professional negligence action constitutes "an action charging malpractice" which is subject to the two year limitations period, the Michigan Supreme Court has routinely held that 'the definition of malpractice and liability therefor are to be determined by resort to the common law.' Local 1064 v Ernst & Young, supra at 329, quoting Sam v Balardo, 411 Mich 405, 424; 308 NW2d 142 (1981). Likewise, MCL 600.2912

states that the liability for malpractice of members of state licensed professions is to be determined by resort to the common law. In this regard, the "common law" means:

> Those rules or precepts of law in any country or that body of its jurisprudence, which is of equal application in all places, as distinguished from local laws and rules.
>
> 449 Mich at 329-330.

Moreover, the common law definition of the term "malpractice" encompasses a professional's "misfeasance or nonfeasance of professional duty." Sam, supra, 411 Mich at 425, fn 20.

The Michigan Supreme Court has made clear that Michigan case law "is certainly relevant to determining whether a particular professional is subject to malpractice under the common law," but not to the exclusion of judicial decisions from other jurisdictions. Id, at 330. Moreover, the Supreme Court has acknowledged that, in the context of malpractice liability, Michigan's law "appears consistent with the common law." Id. It is only where members of a profession were not subject to malpractice liability under Michigan or general common law that the three year general negligence limitations period would apply. Id. See also National Sand, Inc v Williams, 182 Mich App 327, 341-342; 451 NW2d 618 (1990) [remanding action to trial court for determination of whether common law recognized a malpractice action against engineers].

Thus, the controlling inquiry here is whether Architecture was recognized as a profession subject to a professional malpractice action under common law.

Accordingly, the controlling inquiry here is whether architects were subject to malpractice liability under the common law for their breach of professional duties.

In this regard, the Michigan Supreme Court has long recognized that the duties of an architect are consistent with the common law definition of "malpractice" and the breach of those duties may subject an architect to malpractice liability.

In Bayne v Everham, 197 Mich 181, 199-200; 163 NW 1002 (1917), the Michigan Supreme Court held that architects owe the following duties of care:

> This court has held that the responsibility of an architect does not differ from that of a lawyer or physician. When he possesses the requisite skill and knowledge, and in the exercise thereof has used his best judgment, he has done all the law requires. The architect is not a warrantor of his plans and specifications. The result may show a mistake or defect, although he may have exercised the reasonable skill required. Chapel v Clark, 117 Mich 638 (76 NW2d 62, 72 Am St Rep 587).

In further quoting 5 Corpus Juris, p 269, the Supreme Court in Bayne stated that an architect may be subject to liability for breach of its duties as follows:

> In the preparation of plans and specifications, the architect must possess and exercise the case and skill of those ordinarily skilled in the business; if he does so, he is not liable for faults in construction resulting from defects in plans, as his undertaking does not imply or guarantee a perfect plan or a satisfactory result, it being considered enough that the architect himself is not the cause of any failure, and there is no implied promise that miscalculations may not occur.
>
> 197 Mich at 199.

See also Harley v Blodgett Engineering, 230 Mich 510; 202 NW 953 (1925), Chapel v Clark, 117 Mich 638; 76 NW 62 (1898) [recognizing causes of action for architectural malpractice under common law]. Significantly, this liability is not limited by privity of contract; an architect's duty of care extends to any person lawfully on the premises. Francisco v Manson, Jackson & Kane, 145 Mich App 255, 261; 377 NW2d 313 (1985).

Beyond Michigan, the common law recognized that an engineer or architect "may be liable to his employer for short comings in the nature of malpractice." Northern Pacific Railway Co v Goss, 203 F 904, 910 (8th Cir 1913). See also, Alexander v Hammarberg, 103 Cal App 2d 872, 878; 230 P2d 399 (1951) [recognizing malpractice action against architect].

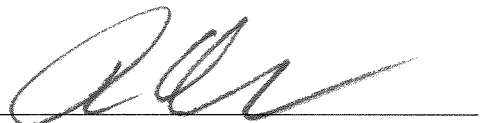
Thus, architects were required to answer for misperformance of their duties under common law in a malpractice action. Consistently, the trial court herein properly applied the two year malpractice statute of limitations to this action. The trial court's order must be reinstated.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Edward Schulak, Hobbs & Black, Inc., respectfully request that this Honorable Court vacate the July 8, 2004 written opinion of the Michigan Court of Appeals and reinstate the trial court's summary disposition order.

Respectfully submitted,

SULLIVAN, WARD,
ASHER & TYLER, P.C.

By: 

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